



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 30, 1996

Anthony P. Picchioni, Ph.D.
Chair, Texas State Board of Examiners of
Professional Counselors
1100 West 49th Street
Austin, Texas 78756-3183

Letter Opinion No 96-116

Re: Whether the complaints committee of
the Texas State Board of Examiners of
Professional Counselors may discuss with its
attorney in a closed meeting complaints
against counselors (ID# 38695)

Dear Dr. Picchioni:

You ask about the propriety of the Texas State Board of Examiners of Professional Counselors' complaints committee discussing in a closed meeting, with the committee's attorney, complaints that have been filed against professional counselors. You believe that Government Code section 551.071 authorizes the complaints committee to meet in a closed meeting for this purpose. Based on the information you provide, we agree with your assessment. We caution, however, that the complaints committee may not take a final action in a closed meeting.

Before we turn to the Government Code provision about which you ask, we believe it will be helpful to examine the statute creating the Texas State Board of Examiners of Professional Counselors (the "board") and the authority for and purpose of the board's complaints committee. Article 4512g, V.T.C.S., the Licensed Professional Counselor Act,¹ creates the board² to regulate licensed professional counselors³ to protect the public health, safety, and welfare.⁴ The board is responsible to, among other things, investigate and resolve complaints filed by consumers and clients⁵

¹See V.T.C.S. art. 4512g, § 1.

²See *id.* § 4(a).

³The practice of professional counseling comprises "the application of mental health, psychotherapeutic, and human development principles" to "facilitate human development and adjustment throughout the lifespan"; prevent, diagnose, and treat mental, emotional, or behavioral disorders; assess and evaluate clients "to establish treatment goals and objectives"; and to implement and evaluate treatment plans using counseling, assessment, consulting, and referral. *Id.* § 2(7) (defining "practice of professional counseling").

⁴*Id.* § 1A(a).

⁵See *id.* § 6A(a).

against licensed professional counselors.⁶ In particular, the Licensed Professional Counselor Act requires the board sufficiently to investigate all complaints so that no complaint is dismissed before it is appropriately considered.⁷

In accordance with its statutory authority to delegate functions and activities to committees,⁸ we understand that the board, a nine-member body,⁹ has appointed a three-member complaints committee that, with the board's executive secretary,¹⁰ evaluates, investigates, and resolves complaints.¹¹

(d) A complaints committee shall be appointed to work with the executive secretary to:

(1) review each complaint and determine whether the complaint fits within the category of a serious complaint affecting the health and safety of clients or other persons;

(2) ensure that complaints are not dismissed without appropriate consideration;

(3) ensure that a person who files a complaint has an opportunity to explain the allegations made in the complaint; and

(4) resolve the issues of the complaint which arise under the Act or this chapter.¹²

⁶*Id.* § 6(d).

⁷*Id.* § 16C(a)(2).

⁸*Id.* § 6(c).

⁹*Id.* § 4(b).

¹⁰The board's executive secretary is an employee of the Texas Department of Health and is appointed to the board's service by the Department of Health, with the board's advice and consent. *Id.* § 8(a). The executive secretary administers professional counselor licensing activities for the board. *Id.* Additionally, the executive secretary investigates complaints and presents formal complaints. *Id.* § 8(a)(5).

¹¹*See* 22 T.A.C. § 681.195(d). You state in your letter to this office that the complaints committee is composed of three board members. *See* Letter from Anthony P. Picchioni, Ph.D., to The Honorable Dan Morales (Mar. 5, 1996).

¹²22 T.A.C. § 681.195(d).

Once the board receives a complaint, the board's executive secretary seeks a response from the licensee or alleged wrongdoer and gathers other information at the request of the complaints committee.¹³ Based upon the response and preliminary information gathering, one of three actions will occur. First, either the executive secretary or the complaints committee may initiate an investigation if sufficient grounds support the complaint.¹⁴ If, after the investigation is completed, the complaints committee is unable to resolve the complaint with the licensee or alleged wrongdoer, the committee may recommend to the board that the board suspend or revoke the license or take some other appropriate action.¹⁵ Second, if the committee determines that insufficient grounds support the complaint, the committee must dismiss the complaint.¹⁶ Third, if the committee determines that the licensee or alleged wrongdoer indeed violated the Licensed Professional Counselor Act or the rules, but the violation "is not a serious complaint affecting the health and safety of clients or other persons," the committee informally may resolve the complaint by, for example, ordering the violator to cease and desist or agreeing with the violator that he or she will correct the violation.¹⁷

You indicate that the complaints committee posts notice of its meetings consistently with the Open Meetings Act, Government Code chapter 551.¹⁸ Although the complaints committee convenes in an open meeting,¹⁹ you state that the committee considers and acts on pending complaints in a closed meeting. According to your letter, the committee discusses each complaint with its attorney concerning whether the licensee or alleged wrongdoer has violated any law or rule; what statute or rule applies to the situation; whether the committee has sufficient evidence to prove a violation; whether the committee should consider or take disciplinary action against the violator; whether the committee should make or accept a settlement offer; what level of disciplinary action the committee should propose to the board; and what terms of probation would be appropriate. As we understand it, a complaint may lead to an informal administrative proceeding, including a settlement conference,

¹³*Id.* § 681.195(e).

¹⁴*Id.* § 681.195(f).

¹⁵*Id.* § 681.195(k).

¹⁶*Id.* § 681.195(g).

¹⁷*Id.* § 681.195(h).

¹⁸See Gov't Code §§ 551.041, .043, .044, .048 (notice requirements for state governmental body).

¹⁹See *id.* § 551.101 (requiring governmental body to convene in open meeting).

or a more formal, quasi-judicial, administrative action;²⁰ we do not understand that a complaint generally results in a judicial proceeding.²¹

The committee premises its retreat to closed meeting on Government Code section 551.071, which authorizes a governmental body to meet behind closed doors to consult with its attorney regarding "pending or contemplated litigation," a "settlement offer," or "on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with" chapter 551.²² You believe the complaints committee's meetings are properly closed:

It is the position of the board that the complaints committee can be closed pursuant to § 551.071(1) because the complaints committee is consulting with its attorney relating to contemplated litigation (administrative hearings under the Administrative Procedure Act) or settlement offers. In addition, it is the position of the board that the meeting can be closed under §551.071(2) because the matters which are discussed trigger a duty on the part of the attorney to maintain confidentiality under the Texas Disciplinary Rules of Professional Conduct.

You ask us to confirm your contention. Before we consider your argument, we assume that you correctly characterize the complaints committee's discussions.

Preliminarily, we note that, although we find nothing in article 4512g or in the board's rules that explicitly requires the complaints committee to adhere to the Open Meetings Act,²³ this office has concluded in previous opinions that, especially in situations where the governmental body is likely to simply rubber stamp a committee's recommendations, the committee is indeed subject to the act although the committee may number less than a quorum of the governmental body.²⁴ Moreover, if the committee actually resolves complaints, it supervises and controls public business and is a

²⁰See 22 T.A.C. §§ 681.198, .211 - .220.

²¹But see V.T.C.S. art. 4512g, § 17.

²²Gov't Code § 551.071.

²³Cf. 22 T.A.C. § 681.3(c).

²⁴See Attorney General Opinions JM-1072 (1989) at 3, H-238 (1974) at 3, H-3 (1973) at 4; cf. H-994 (1977) at

governmental body subject to the Open Meetings Act.²⁵ From your comments, it appears that the complaints committee in fact resolves complaints. We will assume, therefore, that the Open Meetings Act indeed applies to the complaints committee.

We next must address whether Government Code section 551.071 permits closed meetings in the circumstances you describe. If, as you suggest, all of the subjects the complaints committee discusses with its attorney in a closed meeting involve matters in which the attorney's duty to the complaints committee "under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with" the Open Meetings Act, then the closed meeting is proper under Government Code section 551.071(2). If, on the other hand, subsection (2) does not cover all of the subjects discussed, subsection (1) permits the discussion to occur in a closed meeting if the complaints committee is seeking its attorney's advice about "pending or contemplated litigation" or a settlement offer.

Although this office never has stated, in the context of the Open Meetings Act, that the term "litigation" includes pending and contemplated quasi-judicial, administrative proceedings, we believe that it does. In our opinion, section 551.071(1)(A) is analogous to Government Code section 552.103(a)(1), which authorizes a governmental body to withhold from the public information relating to anticipated litigation, and we therefore construe the two sections similarly. In Open Records Decision No. 588 this office stated that "litigation" for purposes of the statutory predecessor to section 552.103(a)(1) "includes contested cases conducted in a quasi-judicial forum."²⁶ Although the Open Records Act, now Government Code chapter 552, does not define the term "litigation," this office noted, the legislature designed the statutory predecessor to section 552.103 to protect the government's interests "in adversary proceedings or in negotiations leading to the settlement thereof."²⁷ Because an adversary proceeding may encompass a proceeding conducted in a quasi-judicial forum as well as in a judicial forum, this office determined that "litigation" for purposes of the Open Records Act includes contested cases under the Administrative Procedure Act.²⁸

We likewise believe that Government Code section 551.071 is designed to protect a governmental body's interests in an adversary proceeding, where to discuss a pending proceeding with the governmental body's attorney in an open meeting would permit the opposing party to learn

²⁵See Gov't Code § 551.001(3), (4) (defining "governmental body" and "meeting"); Attorney General Opinion H-438 (1974) at 4.

²⁶Open Records Decision No. 588 (1991) at 2.

²⁷*Id.* (quoting Open Records Decision No. 301(1982)).

²⁸See *id.* (quoting Open Records Decision No. 301 (1982)).

the governmental body's strategy, evidence, and vulnerabilities. We accordingly conclude that section 551.071(1)(A) authorizes a governmental body to consult with its attorney in a closed meeting regarding pending or contemplated quasi-judicial, administrative proceedings. Because you have indicated that the quasi-judicial proceedings about which you ask are governed by the Administrative Procedure Act,²⁹ we limit our answer to such proceedings. Additionally, and for the same reasons, we believe that section 551.071(1)(B) authorizes a governmental body to consult with its attorney in a closed meeting regarding the settlement of a matter that otherwise would proceed to a quasi-judicial, administrative hearing. Here, you state that the matters the complaints committee discusses with its attorney in closed meeting relate to "contemplated litigation (administrative hearings under the Administrative Procedure Act) or settlement offers." We accordingly conclude that the complaints committee may discuss these matters in a closed meeting under Government Code section 551.071.³⁰

Finally, we caution that a governmental body may not take a final action in a closed meeting.³¹ If the committee dismisses or resolves complaints, we believe it is finally acting on the complaints, and it must do so in an open meeting. Similarly, if the committee takes any other final actions, it must do so in an open meeting.

²⁹See also 22 T.A.C. § 681.213(a) (authorizing complaints committee to initiate formal hearing, which must be conducted in accordance with Administrative Procedure Act, among other things).

³⁰Section 551.071 does not authorize an executive session to discuss potential litigation with the opposing party, nor does it permit the attendance of any person who is not entitled to hear confidential attorney-client communications between the complaints committee and its attorney. Attorney General Opinions JM-238 (1984) at 4, MW-417 (1981) at 2-3.

³¹Gov't Code § 551.102.

S U M M A R Y

Government Code section 551.071(1)(A) authorizes a governmental body, including the Texas State Board of Examiners of Professional Counselors' Complaints Committee, to consult with its attorney in a closed meeting regarding pending or contemplated quasi-judicial, administrative proceedings governed by the Administrative Procedure Act. Similarly, section 551.071(1)(B) authorizes a governmental body to consult with its attorney in a closed meeting regarding the settlement of a matter that otherwise would proceed to a quasi-judicial, administrative hearing.

Government Code section 551.071(2) authorizes the Texas State Board of Examiners of Professional Counselors' complaints committee to consult with its attorney in a closed meeting about matters in which the attorney's duty to the complaints committee "under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with" the Open Meetings Act, Government Code chapter 551.

The complaints committee must take any final actions in an open meeting.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge", with a stylized flourish at the end.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee